

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC SUIT NO. 59 OF 2019

NYANUAYA YIENE JACOB.....1ST

PLAINTIFF

RICHARD AWITI OKENGO.....2ND

PLAINTIFF

DAVID OTIENO ODANGA.....3RD

PLAINTIFF

THE REGISTERED TRUSTEES OF KISUMU

CENTRE JUA KALI ARTISAN ASSOCIATION.....4TH

PLAINTIFF

**(Suing on behalf of themselves and on behalf of Kisumu
Centre Jua Kali Artisans Association)**

VERSUS

KISUMU COUNTY GOVERNMENT.....1ST

DEFENDANT

CITY MANAGER KISUMU COUNTY.....2ND

DEFENDANT

THE COUNTY COMMISSIONER

KISUMU COUNTY..... 3RD

DEFENDANT

THE CABINET SECRETARY,

MINISTRY OF TRANSPORT, INFRASTRUCTURE,

HOUSING AND URBAN DEVELOPMENT,

STATE DEPARTMENT OF HOUSING AND URBAN

DEVELOPMENT.....4TH

DEFENDANT

THE ATTORNEY GENERAL.....5TH

DEFENDANT

THE KENYA RAILWAYS CORPORATION.....6TH

DEFENDANT

THE NATIONAL LAND COMMISSION.....7TH

DEFENDANT

THE COUNTY LAND REGISTRAR.....8TH

DEFENDANT

CONSOLIDATED WITH

ELC SUIT NO. 8 OF 2020

KENYA RAILWAYS CORPORATION.....

.....PLAINTIFF

VERSUS

JOHN JARED ODERO.....1ST

DEFENDANT

PETER NYAONDO NYAWANDA.....2ND

DEFENDANT

PAUL OHUARE OBADHA.....3RD

DEFENDANT

THE REGISTERED TRUSTEES OF KISUMU CENTRE

JUA KALI ARTISANS ASSOCIATION.....4TH

DEFENDANT

THE NATIONAL LAND COMMISSION.....5TH

DEFENDANT

THE COUNTY LAND REGISTRAR, KISUMU.....6TH

DEFENDANT

JUDGMENT

In this judgment, as much as is practicable, I will refer to the parties as they appear in ELC Suit No. 59 of 2019 to achieve the intention of the court expressed in the directions given on 10th March 2020 when ELC Suit No. 59 of 2019 was consolidated with

ELC Suit No. 8 of 2020. Reference to the Plaintiffs would therefore mean the Plaintiffs in ELC Suit No. 59 of 2019, while reference to the Defendants would mean the Defendants in ELC Suit No. 59 of 2019 as they appear in that suit, unless indicated otherwise. The Plaintiffs instituted ELC Suit No. 59 of 2019 through a plaint dated 17th December 2019. The 6th Defendant, on the other hand, instituted ELC Suit No. 8 of 2020 through a plaint dated 6th February 2020. ELC Suit No. 8 of 2020 was consolidated with ELC Suit No. 59 of 2019 on 10th March 2020. During the consolidation, the court directed that the parties in ELC Suit No. 8 of 2020, who were not parties to ELC Suit No. 59 of 2019, be added as Defendants to the latter suit. The Kenya Railways Corporation, the Plaintiff in ELC Suit No. 8 of 2020, was added to ELC Suit No. 59 of 2019 as the 6th Defendant, while the National Land Commission, which was the 5th Defendant in ELC Suit No. 8 of 2020, was added to ELC Suit No. 59 of 2019 as the 7th Defendant. The court directed further that the Kenya Railways Corporation's claim in ELC Suit No. 8 of 2020 be deemed as its counterclaim in ELC Suit No. 59 of 2019. The Plaintiff amended the plaint in ELC No. 59 of 2019 on 3rd April 2021 and added the Attorney General, the Kenya

Railways Corporation, the National Land Commission, and the County Land Registrar as the 5th, 6th, 7th and 8th Defendants, respectively, to the suit.

The Plaintiffs' Case

The Plaintiffs averred that the 1st, 2nd and 3rd Plaintiffs were members and officials of the 4th Plaintiff, Kisumu Centre Jua Kali Artisans Association (hereinafter referred to only as “the Association”). The Plaintiffs averred that the Association was at all material times the registered leasehold proprietor of all that parcel of land known as Title No. Kisumu Municipality/ Block 6/517 (hereinafter referred to as “the suit property”). The Plaintiffs averred that the suit property was allocated to the Association by the Government of the Republic of Kenya on 4th January 1994. The Plaintiffs averred that the members of the Association who were artisans had been carrying out various business activities on the suit property, such as metal fabrication, panel beating, mechanical engineering works, manufacturing, and other related activities, since 1986. The Plaintiffs averred that the Association and its members had always complied with all governmental and

institutional policies and obligations, such as the payment of taxes.

The Plaintiff averred that sometime in November 2019, the Defendants, under the banner of Uhuru Business Park Market Complex, proposed to construct a market on the suit property without the Plaintiffs' permission. The Plaintiffs averred that the Defendants did not engage them or invite them to the project-affected persons consultative meeting to discuss the matter. The Plaintiffs averred that the Defendants intended to relocate them to a smaller area and take over the suit property illegally. The Plaintiffs averred that the Defendants intended to allow other traders not aligned to their kind of business to conduct business on the suit property, such as salonists, carpenters, and fish mongers, in disregard of the fact that they had carried on their businesses on the suit property since 1986 and had established good customer links for their businesses which were their source of livelihood.

The Plaintiffs averred that the intended compulsory acquisition and consequent demolition of their properties/stalls on the suit

property would result in a violation of their constitutional right to property. The Plaintiffs averred that their attempt to resolve the dispute was frustrated by the Defendants. The Plaintiffs averred that, without compensating them for the losses they would incur, the Defendants had no right over the suit property and their intended action was an infringement on the Plaintiffs' constitutional right to peaceful ownership and use of their properties.

The Plaintiffs averred that the intended acquisition of the suit property and consequent demolition of their structures thereon were illegal, unprocedural, unlawful, and unjust. The Plaintiffs pleaded several particulars of the Defendants' alleged illegal acts. The Plaintiffs averred that the Defendants' intended actions were malicious and tainted with bad faith. The Plaintiffs averred that the 6th Defendant was a state corporation, and as such was subordinate to the Government of Kenya, which allocated the suit property to the Plaintiffs.

The Plaintiffs averred that the Defendants' intended actions were illegal, unlawful, oppressive and violated the Plaintiffs' socio-

economic rights. The Plaintiffs averred in the alternative that they had occupied the suit property for the last 36 years and as such had acquired prescriptive rights over the same as against the 6th Defendant. The Plaintiffs averred that they should be allowed to keep the land. The Plaintiffs prayed for judgment against the Defendants for;

- (a) A permanent injunction restraining the Defendants, their agents, servants, assigns, relatives or whomsoever claiming title or acting on their behalf from remaining in, occupying, continuing to occupy and selling, trespassing, encroaching into, compulsorily acquiring and in any other manner interfering with the suit property.
- (b) A declaration that the Plaintiffs were the absolute and indefeasible owners of the suit property.
- (c) A declaration that the Plaintiffs' land cannot be taken away without compensating the Plaintiffs for the said land and loss of business for all members of the Association.
- (d) A declaration that the suit property was procedurally and properly acquired by the Plaintiffs.

- (e) In the alternative, a declaration that the Plaintiffs have acquired prescriptive rights over the suit property.
- (f) Costs of this suit.
- (g) Any other relief this court may deem fit to grant.

The 1st and 2nd Defendant's Case

The 1st Defendant, in its statement of defence dated 22nd June 2020, denied the averments in the plaint and prayed that the suit against it be dismissed with costs.

The 3rd, 4th, 5th and 8th Defendants' Case

The 3rd, 4th, 5th and 8th Defendants entered an appearance through the office of the Attorney General, but did not file a statement of Defence

The 6th Defendant's Case

As stated earlier in the judgment, the 6th Defendant's claim in ELC Suit No. 8 of 2020 is deemed as its defence to the Plaintiffs' claim in ELC Suit No. 59 of 2019, and a counter-claim against the Plaintiffs. The 6th Defendant averred that under the provisions of Sections 13 and 14 of the Kenya Railways Corporation Act,

Chapter 397 Laws of Kenya, the 6th Defendant is entitled to acquire and hold land for the purposes of discharging its duties and performing its operations as provided for under the Act. The 6th Defendant averred further that it is also entitled to dispose of any such land in its possession either by way of sale, lease, or otherwise, but in accordance with the provisions of the Act. The 6th Defendant averred that it had been the registered owner of all that parcel of land, Title No. Kisumu Municipality/Block 6/95 measuring approximately 9.4295 Ha (23.29 acres) (hereinafter referred to as “the Railway land”). The 6th Defendant averred that it owned the Railway land by operation of the Kenya Railways Corporation (Vesting of Land) Order 1986, contained in Legal Notice No. 24 of 1986, which replaced and revoked the Kenya Vesting of Land Regulations 1963, Legal Notice No. 440 of 1963, which created an exclusive proprietary interest thereon in favour of the East African Railways Corporation the predecessor of the 6th Defendant.

The 6th Defendant averred that the Railway land was previously registered as a leasehold land in favour of the General Manager of the East African Railways and Harbours Administration as L.R.

Number 1148/1168. The 6th Defendant averred that it had in its possession all the documents of title, including maps showing that the Railway land belonged to it. The 6th Defendant averred that in 2019, it was incorporated into a project management team for the revitalization of Kisumu Port and Lake Victoria transport. The 6th Defendant averred that to enable the 1st Respondent to deliver this project, the 6th Defendant leased to the 1st Respondent the Railway land measuring 23.29 acres for the development of a modern market to resettle the businesses affected at Lwang'ni Beach and the hawkers within Kisumu Central Business District (CBD).

The 6th Defendant averred that upon moving to confirm the boundaries and beacons of the Railway land leased to the 1st Defendant, it was surprised to learn that there were subdivisions on the same parcel of land which had Title Nos. Kisumu Municipality/ Block 6/393,392,391,397,398,399,400,409 and 517. The 6th Defendant averred that out of these parcels of land, the Plaintiffs claimed to be the leasehold registered owners of the suit property measuring 3.405 Hectares for a term of 99 years with

effect from January 1994. The 6th Defendant averred that the Plaintiffs' lease was registered in June 2016.

The 6th Defendant averred that the Plaintiffs claimed that the suit property was allocated to them through a letter of allotment Ref. No. 30973/LI/71 dated 4th January 1994 by the Ministry of Lands and Housing, and that a lease was issued to them on 11th January 1999 by the President of the Republic of Kenya. The 6th Defendant averred that the Plaintiffs claimed that a certificate of lease was issued to them by the County Government of Kisumu on 20th June 2016. The 6th Defendant averred that the Plaintiffs' claim was fraudulent. The 6th Defendant averred that a search conducted over the Railway land on 25th October 2000 showed that the same was still registered in favour of the 6th Defendant and/or its predecessors and that the acreage was indicated as 9.4295 Ha. (23.29acres). The 6th Defendant contended that it had never surrendered the Railway land or any part thereof to either the Ministry of Lands and/or the County Government of Kisumu for allocation, subdivision, and alienation to any person, including the Plaintiffs.

The 6th Defendant contended that the purported acts of the Ministry of Lands to allocate part of the Railway land to other entities, and the issuance of leases both by the Central Government and the Kisumu County Government, to the said entities, were illegal, as they were done without due regard for the rights of the 6th Defendant over the Railway land. The 6th Defendant contended that the said acts were illegal, fraudulent, null, and void.

The 6th Defendant prayed for judgment against the Plaintiffs for;

- (a) A declaration that the entire parcel of land known as Title No. Kisumu Municipality Block 6/95, measuring 23.29 acres (Railway land), belongs to the 6th Defendant, and any subdivision to create the land parcel Title No. Kisumu Municipality Block 6/517 (the suit property) was illegal, irregular, fraudulent, null, and void.
- (b) An order for cancellation and/or revocation of the title for the suit property.
- (c) An order of eviction against the Plaintiffs from the Railway land.

- (d) A permanent injunction to restrain the Plaintiffs, their servants and/or agents from interfering with the 6th Defendant's or their agents' use and possession of the Railway land, and transferring, selling, trespassing, encumbering and/or otherwise dealing with the whole or part of the Railway land.
- (e) Any other relief the court deems fit to grant in the circumstances.
- (f) Costs of this suit.

The 7th Defendant's Case

The 7th Defendant neither entered an appearance nor filed a defence.

At the trial, the Plaintiffs called several witnesses. The Plaintiffs' first witness was David Otieno Odanga (PW1). PW1 stated that he was the treasurer of the Association when the suit was filed, but was the secretary of the Association at the time of his evidence. PW1 adopted his witness statement filed on 23rd March 2021 as part of his evidence in chief. He produced the documents attached to the Plaintiffs' list of documents dated 17th December

2019, filed on the same date as P.EXH. 1-15 respectively, the documents attached to the Plaintiffs' list of documents dated 5th November 2020, filed on 7th December 2020, as P.EXH. 16-26 respectively, and the documents attached to the Plaintiffs' further list of documents filed on 22nd March 2020 as P.EXH. 27-29, respectively. PW1 stated that the Association was registered with the Registrar of Societies in 1993. He stated that the Association had a title to the suit property, which was allocated to them by the Government of Kenya, and they were issued with a certificate of lease.

PW1 stated that the suit property was developed by the National Government. He stated that the 6th Defendant used to own land neighbouring the suit property, and there was a boundary erected between the 6th Defendant's land and the suit property. PW1 stated that the 1st Defendant wanted part of the suit property to build sheds for persons who were displaced in Lwang'ni area. He stated that the 1st Defendant wanted the block near Agha Khan. He stated that the 6th Defendant was only entitled to the land in their occupation, which was Title No. Kisumu Municipality Block 6/95 (Railway land), and not the suit property, Title No. Kisumu

Municipality/Block 6/517. He stated that the Railway land and the suit property were not the same. He stated that the Association's members operating on the suit property were about 38,000 people. He stated that the Defendants had not given the Plaintiffs an alternative land for their businesses. He stated that the Ministry of Cooperative Development had partnered with the Association, and they had erected a structure worth Kshs. 3.5 million. He stated that the 1st Defendant also constructed an ablution block for them, while the Municipality of Kisumu had constructed a toilet block for them.

On cross-examination by the advocate for the 1st and 2nd Defendants, PW1 admitted that Railway land was owned by the 6th Defendant. He stated that the Association was allocated the suit property in 1994. PW1 admitted that their lease had no registration date and was not signed by the land registrar. He stated that the 1st Respondent was not the proponent of the project that was to be implemented on the suit property according to the architectural plans but a beneficiary thereof.

On cross-examination by the advocate for 3rd, 4th, 5th and 8th Defendants, PW1 stated that the Association was registered as a private entity under the Societies Act. He stated that their certificate of lease for the suit property had Peter Nyaondo Nyawanda, and Paul Ohuare Obadha as the lessees. He stated that the suit property measured 8.4 acres (3.4 Ha.), while Railway land measured 23.2 acres. He stated that they filed the suit because they were ordered to vacate the suit property for a market project. He stated that they were not informed that they would be accommodated in the project.

On cross-examination by the advocate for the 6th Defendant, PW1 stated that the suit property was owned by the Association. He stated that the Association had a lease document and a certificate of lease issued on 20th June 2016. PW1 admitted that the 6th Defendant's lease commenced in 1932 and as such was first in time. He stated that the map produced by 6th Defendant showed that the suit property was within Railway land. PW1 stated that the suit property was allocated to the Association by the Government. He admitted that the maps produced by the 6th Defendant showed that Railway land had not been subdivided.

The Plaintiff's second witness was Patrick Opiyo Adero (PW2). PW2 told the court that he was a registered land surveyor and had been a surveyor for 36 years. He stated that he was practicing under the name, Opiyo & Associates. He adopted his witness statement dated 30th April 2021 as part of his evidence in chief and produced a Ground Report that he prepared dated 20th December 2020 as P.EXH.30. He stated that while preparing the report, one of the documents he relied on was a letter by the Director of Applied Technology to the Commissioner of Lands dated 30th December 1998. He stated that the letter requested the Commissioner of Lands to allocate land measuring 3.5 Ha. to the Artisans. He stated that the letter was not an allocation but a request to the Commissioner of Lands to issue a lease certificate. He stated that the allocation of the land had been done earlier. He stated that the letter of allotment was not dated, but the allotment was accepted by the Plaintiffs. He stated that the Director of Surveys surveyed the land, and the survey was approved. He stated that the land was assigned parcel number Kisumu/Block 6/517 (the suit property). He stated that the Registry Index Map was amended by the Director of Surveys to

depict the suit property. He stated that the lease was prepared and signed on 11th January 1999 by Wilson Gachanja the then Commissioner of Lands, and the Land Registrar thereafter issued a certificate of lease dated 20th June 2016. PW2 stated that the Plaintiffs requested him to confirm the location of the suit property on the ground. He stated that his role was to re-establish the beacons. He told the court that he re-established the beacons, and he was issued with a beacon certificate on 7th November 2020. He stated that there cannot be an allocation of land without a Part Development Plan (PDP). He told the court that in this case, a PDP reference N9/92/40 was prepared and forwarded to the Commissioner of Lands by the Provincial Physical Planning Officer under the cover of a letter dated 2nd July 1998. He stated that the PDP was part of the documents produced by the Plaintiffs. PW2 stated that the allocation of the suit property to the Plaintiffs was done lawfully. He stated that there was no objection to the allocation by any government body, nor was there any objection at the time he was reestablishing the beacons.

On cross-examination by the 1st and 2nd Defendants' advocate, PW2 stated that he had not seen any application for land

allocation by the Plaintiffs in respect of the suit property. He stated the letter of allotment that he had seen was addressed to the Association, but the same was neither dated nor signed. He stated that he had also not seen evidence of payment of the allocation charges of Kshs. 253,400/=. He stated that he did not carry out a search on the suit property as it was not necessary before reestablishing the beacons. PW2 stated that the suit property was adjacent to a railway line at the time he was reestablishing the beacons. He stated that he did not know that the 6th Defendant was claiming the same property. He stated that a lease needs to be signed. He stated that the lease in question was signed by Wilson Gachanja on 11th January 1999, but not by the Association. PW2 stated that the lease was also not registered as it did not bear the signature of the land registrar. He told the court that the suit property was unalienated Government land before it was allocated to the Plaintiffs. He stated that the land could not be allocated to the Plaintiffs if it had been allocated earlier to the 6th Defendant.

On cross-examination by the advocate for the 6th Defendant, PW2 stated that a PDP was prepared in respect of the suit property. He

stated that a PDP is prepared when a portion of a bigger parcel of land is being allocated. He stated that the PDP is supposed to show the neighbouring plots. When shown the Registry Index Map (RIM) for Kisumu Municipality Block 6, he stated that he could see that land parcels 400, 399, 398, and 397 had no access roads. He stated that they may have had easements allowing the occupants to pass through other parcels. When shown the documents in the 6th Defendant's bundle of documents filed on 7th December 2020, he stated that he could see survey plan No. 108/112 in respect of L.R. No. 1148/1168, and the lease in respect of L.R. No. 1148/1168 signed on 11th October 1967, which commenced on 1st January 1932. He stated that the lease was vested in the East African Railways Corporation on 5th September 1969. PW2 also admitted seeing a certificate of lease in respect of Title No. Kisumu/Municipality/Block 6/95(Railway land), in which the lessor was the Government of Kenya and the lessee was Kenya Railways Corporation. He stated that the survey plan Folio No. 108/112, through which the Railway land was created, was cited in the survey plan Folio No. 35/56, through which the suit property was created. He stated that it appeared that the Railway land was

neighbouring the suit property. PW2 stated that even if it were found that the Plaintiffs' land was within the Railway land, the title would still be valid if the 6th Defendant was involved in the allocation of the land. He stated that he did not find any evidence of the involvement of the 6th Defendant in the allocation of the suit property to the Plaintiffs.

On cross-examination by the advocate for the 3rd, 4th, 5th and 8th Defendants, PW2 stated that when he went to the ground, he found the Plaintiffs in occupation of the suit property. He stated that the neighboring plots were also occupied. PW2 stated that the structures by the Plaintiffs were temporary and that the lease in favour of the Plaintiffs was not registered.

On re-examination, PW2 stated that the letter dated 29th November 2019, by the Director of Land Administration to the Plaintiffs, confirmed that the suit property was allocated to the Plaintiffs and that they made the necessary payment. He stated further that the fact that the lease was not signed did not make it invalid. He stated that the land owned by the 6th Defendant and the suit property were different. PW2 stated that there was

nothing abnormal in the certificate of lease being issued in the names of individual trustees of an association.

PW1 David Otieno Odanga was recalled. He gave further evidence in chief and was cross-examined and re-examined. In his evidence on recall, PW2 stated that his evidence given earlier was given in his capacity as the Secretary of Kisumu Jua Kali Artisans Association (the Association). He stated that he testified on behalf of all four Plaintiffs. He stated that he was not a trustee of the Association. He stated that John Jared Odero was known to him. He stated that he was a trustee of the Association and had recorded a witness statement in the matter, which was filed in court together with the amended plaint. PW1 stated that he was familiar with the signature of John Jared Odero. He adopted the contents of the statement. He stated that John Jared Odero had also filed a bundle of documents on 3rd May 2021, which PW1 produced as P.EXH. 31. He stated that the Plaintiffs filed a further list of documents dated 16th October 2023, which he produced as a bundle as P.EXH.32. He stated that the suit property was registered in the name of the Association. He stated that the lease in their favour was registered and was part of P.EXH.32. He

told the court that he attended a meeting whose purpose was to resolve the dispute. He stated that the meeting, which was held in October 2021, was convened by the Ministry of Industrialization, Trade and Enterprises, and was held at the D.C's Boardroom. He stated that all the parties to the suit were represented.

PW1 stated that the meeting resolved that the possession of the suit property would remain with the 4th Plaintiff, but the Permanent Secretary Ministry of Finance would hold the title as a trustee in place of the trustees of the 4th Plaintiff. He stated that the agreement was supposed to be reduced to writing and signed by all the parties. He stated that the agreement was drafted, but the 6th Defendant proposed an amendment unacceptable to the Plaintiffs. He told the court that due to the disagreement over the proposed amendment, the agreement was not signed, and the parties came back to court. He stated that the Government had a lot of interest in the land. He stated that the Government had Nyayo Sheds on the land and had also constructed an 8-door workshop on the land. He stated that, in addition, the Government had built for the Association's Sacco an office at a cost of Kshs. 2.5 million. He stated that on the same land, the

Government had erected Kisumu Town West Constituency Industrial Development Centre, which was equipped. He stated that the Government renovated the Centre at a cost of Kshs. 3.4 million. He told the court that the other developments on the land by the Government were contained in the statement of John Jared Odero.

PW1 stated that the suit property was public land granted to the Association, which was operating under a Government Ministry. He stated that the County Government of Kisumu, the 1st Defendant, had also supported the Association by building the toilets and a workshop shed at a cost of Kshs. 2,000,000/=. He stated that the shed was still in place. He stated that they came to court to challenge the 6th Defendant's claim over the suit property. PW1 stated that in 2019, they learnt that the 1st and 6th Defendants had partnered to put up a market that extended to their land. He stated that they were not consulted on the design of the market. He stated that the 6th Defendant had no right over the suit property. He reiterated that the Plaintiffs followed due process in acquiring the suit property. He stated that neither the

Government of Kenya nor the 1st Defendant had challenged the legality of their title.

On further cross-examination by the advocate for the 1st and 2nd Defendants, PW1 stated that the 1st Defendant had supported the Association, and had not contested their title to the suit property. He stated that the 1st Defendant had no claim over the suit property. He stated that it was the 4th defendant which was responsible for building Uhuru Market. He stated that the members of the Association would lose if the proposed market was built, as it did not factor in the artisans.

PW1 stated that they had the original copy of the 2016 lease, but had deposited it in safe custody at the Cooperative Bank. He stated that the dispute was not resolved because the 6th Defendant came up with an amendment that was not discussed and which did not accommodate the Plaintiffs.

On further cross-examination by the advocate for the 3rd, 4th, 5th, and 8th Defendants, PW1 stated that he had the minutes of the meeting that was held on 14th October 2021. He stated that he was present at the meeting. He stated that the state department

stated that public land could not be in the name of private individuals. PW1 stated that the Plaintiffs did not object to the suit property being in the name of the Government. He stated that it was agreed that the land would be used by the Association, but the names of the then registered owners would be removed. He stated that the land was to be in the name of the Permanent Secretary National Treasury as a trustee for the Association. He stated that the Plaintiffs had no objection to the ownership of the suit property reverting to the name of a government entity to hold for the Association.

On cross-examination by the advocate for the 6th Defendant, PW1 stated that he had seen the documents filed by the 6th Defendant. He stated that the Plaintiffs were not disputing the fact that the suit property may have originally belonged to the 6th Defendant since the whole of Kisumu initially belonged to the 6th Defendant. He stated that he was not disputing the historical ownership of the suit property. He stated that the 6th Defendant had proposed that the suit property be retained by the 6th Defendant and used by the Association. He stated that this was not what was agreed at the meeting. He stated that the minutes were not signed by

the parties. He stated that the same were circulated to the parties, but the 6th Defendant objected to the resolution on the party to hold the title for the suit property.

In re-examination, PW1 stated that the 2016 lease was executed and registered. He stated that the 1999 lease was a standard lease that was issued to all Jua kali Associations. He stated that the 2016 lease was issued to them when they wanted a specific lease in their name. He stated that there was no difference in the two leases. He stated that they sued the 1st Defendant because in 2019, they were facing imminent eviction, which they believed was going to be undertaken by the 1st Defendant, which wanted to build Uhuru Market.

The Plaintiffs' last witness was Fanuel Watson Mango (PW3). PW3 adopted his witness statement dated 9th June 2023 as his evidence in chief.

On cross-examination by the advocate for the 6th Defendant, PW3 stated that he was the Government officer in charge of the Jua Kali Sector in Kisumu at the material time. He stated that he did not know about the lease in respect of Title No. Kisumu

Municipality/Block 6/95(Railway land). He told the court that the suit property was owned by the Government of Kenya through the Municipal Council of Kisumu.

On cross-examination by the advocate for the 1st and 2nd Defendants, PW3 stated that he was acting pursuant to a policy directive that was given by the Permanent Secretary, which was circulated to all government agencies. He told the court that in this case, the suit property was given out to the Association by the Municipal Council of Kisumu. He admitted that he did not see the Municipal Council of Kisumu's title to the suit property, and he had no evidence that the Municipal Council of Kisumu gave the Plaintiffs the suit property. He stated that the suit property was on Block 6. He told the court that his role was to implement a government policy, and he was not bothered with the titles of properties.

In re-examination, PW3 stated that he knew nothing about the 6th Defendant's title and that his role was to implement the policy of the Government. He stated that he teamed up with the County Government to develop the suit property. In examination by the

Court, PW3 stated that when he came to Kisumu, the disputed land was already in the hands of the Jua Kali sector, and he was given instructions on what to do by his Permanent Secretary. He stated that the Jua Kali sector was the beneficiary of the Government project. He stated that he was the Government officer in charge of the implementation of the project. He stated that during the implementation, he worked with senior Municipal Council of Kisumu officials, like the town clerk.

The 1st and 2nd Defendants called Michael Abala Wanga (DW1) as their sole witness. DW1 told the court that he was the City Manager of Kisumu City. He adopted his witness statement dated 28th January 2025, as his evidence in chief. He stated that the suit property was owned by the 6th Defendant and was being used by the Jua Kali sector. He told the court that the Jua Kali sector had occupied the suit property for several years. DW1 stated that there was no intention of evicting the Jua Kali artisans from the suit property. He stated that they were occupying land belonging to the 6th Defendant and Kisumu County Government. He told the court that the land in dispute was owned by Kenya Railways Corporation and there was no intention of evicting the Plaintiffs

therefrom until the County Government finds a place to settle them.

On cross-examination by the advocate for the 6th Defendant, DW1 stated that the land in dispute was public land which belonged to the 6th Defendant. On cross-examination by the advocate for the Plaintiffs, DW1 stated that the Plaintiffs acquired the land in dispute, Title No. Kisumu Municipality/ Block 6/517 fraudulently. He stated that the 1st Defendant had not done anything on the disputed land. He stated that they had put up Uhuru Market in the neighboring land. He stated that the Municipal Council of Kisumu constructed toilets on the suit property, and the National Government put up the other structures on the land. He stated that the Jua Kali sector was under the National Government. When shown the minutes of the meeting held on 14th October 2021, he stated that he had no problem with resolution No. IV of the meeting. He stated that resolution No. V was a complicated arrangement. He stated that he had no problem with the Permanent Secretary of the National Treasury holding the title for the suit property. He stated that they had no problem with the Jua Kali artisans using the disputed land.

The 6th Defendant called, Geoffrey Wekesa Nyongesa (DW2), as its sole witness. DW2 stated that he worked with the 6th Defendant, Kenya Railways Corporation, as a Senior Cartographer. He adopted his witness statement dated 6th February 2020 as part of his evidence in chief. He produced the documents attached to the 6th Defendant's list of documents dated 6th February 2020 as D.EXH. 1-9 respectively. He stated further as follows: The suit property belonged to the 6th Defendant. The Plaintiffs' title was overlaying the 6th Defendant's title. The 6th Defendant was not involved in the initial partnership between the National Government and the Plaintiffs. The Plaintiffs' lease at page 4 of P.EXH.32 was dated 14th April 2016, while the 6th Defendant's lease was issued on 8th February 1979. The Plaintiffs' lease had no Deed plan reference number. The lease was issued by the 1st Defendant, the County Government of Kisumu. The 6th Defendant did not surrender the suit property to the County Government of Kisumu. The lease was not supported by a surrender.

DW2 stated further that: He attended the meeting of 14th October 2021. The meeting did not agree on anything. The meeting was

called by the Ministry of Industrialization for them to agree on a working arrangement with those who were in occupation of the suit property. The 6th Defendant was involved because it was the owner of the land in dispute. The Plaintiffs were claiming land measuring 3.405Ha. (Approximately 8.413 Acres). The whole land owned by the 6th Defendant measured 23.9 Acres. When they went to the ground, they found irregular subdivisions. The land claimed by the Plaintiffs was part of the 6th Defendant's land. He stated that the irregular titles should be revoked and the illegal occupants evicted.

On cross-examination by the advocate for the 1st and 2nd Defendants, DW2 stated as follows: the 6th Defendant was independent from the County Government of Kisumu (1st Defendant), and could carry out the eviction on its own. On cross-examination by the advocate for the Plaintiffs, DW2 stated that he was a cartographer. He stated that he was reporting to the Principal Surveyor, who reported to the Environment Manager. He told the court that he did not sign transfers of land on behalf of the 6th Defendant. He stated that he was not aware of Executive Order No. 5 of 2024, which placed the 6th Defendant under the

National Treasury. He stated that a decision to surrender the 6th Defendant's land to another Government entity was to be made at a Cabinet level. DW2 stated that the Government must follow the laid-down procedure when it wants to transfer the 6th Defendant's land to another entity. He stated that he attended the meeting at Huduma Centre, which was convened to try to find an amicable solution to the dispute. He stated that they did not agree on the issue of the title to the land. He stated that the land was in the name of individuals. He stated that the meeting agreed that the names of individuals be removed. He stated that they did not have a change of mind as the resolutions were not passed. He stated that the property must remain in the name of the 6th Defendant and must be procedurally transferred. He stated that they had no problem with the use of the land. He told the court that their problem was with the procedure. He stated that the advertisements he had produced concerned illegally acquired land. He stated that the suit property was not in the notice. He stated that they learnt that the suit property was in the name of the Association around 2019.

On re-examination, DW2 stated that the Plaintiffs had not adduced evidence showing that the 6th Defendant surrendered the suit property to any government institution. He stated that the 6th Defendant was not involved in the allocation of the suit property to the Plaintiffs, and he was not aware of the cabinet decision to allocate the suit property to the Plaintiffs. He stated that the 6th Defendant's markers on the ground did not represent survey boundaries.

The other Defendants did not tender evidence at the trial. After the close of evidence, the court directed the parties to make closing submissions in writing.

The Plaintiffs' submissions

The Plaintiffs filed submissions dated 25th March 2025. The Plaintiffs submitted that it was in the public interest that the suit property remained with the Jua Kali artisans. The Plaintiffs submitted that the socio-economic factors led the Government to give out the land to re-engineer the social order in the interest of the public. In support of this submission, the Plaintiffs cited Mureithi & 2 Others (For Mbari Ya Murathimi Clan) v. Attorney

General & 5 Others, Nairobi HCMCA No. 158 of 2005 (2006) 1 KLR 443. The Plaintiffs submitted that the 6th Defendant, being a state organ, could not stop the government from alienating public land in favour of another state organ for development purposes. The Plaintiffs submitted that the allocation of the suit property to the Plaintiffs was in the public interest.

The Plaintiffs submitted that the 6th Defendant pleaded fraud. The Plaintiffs submitted that the government cannot be accused of stealing land from itself when it reallocated public land for public purposes to spur economic development. The Plaintiffs cited Vijay Morjaria v. Nansingh Madhusingh Darbar 7 Another [2000] eKLR and Railal Gordhanbhai Patel v. Lalji Makanji [1957] E.A 314 and submitted that the 6th Defendant did not prove that the Plaintiffs' title to the suit property was acquired fraudulently.

The 1st and 2nd Defendants' submissions

The 1st and 2nd Defendants filed submissions dated 11th April 2025. The 1st and 2nd Defendants framed the following issues for determination;

1. Whether Title No. Kisumu Municipality Block 6/517 (the suit property) constitutes part of the land that was set apart as a railway reserve and vested in the Kenya Railways Corporation under the provisions of the Kenya Railways Corporation Act, Chapter 397 Laws of Kenya.
2. Whether the Plaintiffs could hold a lease to land that had already been alienated.
3. Whether the County Government was a necessary party or rightfully sued.
4. Who is to bear the costs of this suit?

The 1st and 2nd Defendants submitted that the suit property was owned by Kenya Railways Corporation, the 6th Defendant, and as such was public land. The 1st and 2nd Defendants submitted that the suit property was not available for allocation to the Plaintiffs. The 1st and 2nd Defendants submitted that the suit property was part of Title No. Kisumu Municipality/Block 6/95 (Railway land), which was vested in the predecessor of the 6th Defendant, the East African Railways and Harbours Administration, through Legal Notice No. 440 of 1963 by Governor Malcolm McDonald. The 1st and 2nd Defendants submitted that the Defendants presented Plan

No. 84608 for East African Railways land and a Deed Plan dated 2nd May 1967, identifying the Railway land as L.R. No. 1148/1168-1169. The 1st and 2nd Defendants submitted that it was apparent from the mentioned plans that the Railway land at the date of publication of the Legal Notice No. 440 of 1963, was surveyed land, which was reserved for use by the East African Railways and Harbours. The 1st and 2nd Defendants submitted that Railway land was lawfully vested in the East African Railways and Harbours through Legal Notice No. 440 of 1963.

The 1st and 2nd Defendants submitted that the Railway land was later vested in the 6th Defendant by operation of the Kenya Railways (Vesting of Land) Order 1986, contained in Legal Notice No. 24 of 1986, which replaced and revoked the Vesting of Land Regulations 1963 (L/N No.440/1963). In support of this submission, the 1st and 2nd Defendants relied on Kenya Railways Corporation v. Ali & another; Chief Land Registrar (Interested Party) (Environment & Land Case 633 of 2015) [2024] KEELC 1814 (KLR) (11 April 2024) (Judgment). The 1st and 2nd Defendants submitted that when the suit property was purportedly allocated to the Plaintiffs by the Commissioner of Lands, the same was

already alienated to the Kenya Railways Corporation, the 6th Defendant, and as such, the same was not available for allocation to the Plaintiff. The 1st and 2nd Defendants submitted that the land could only be allocated to the Plaintiffs if it had been surrendered to the government by the 6th Defendant under Section 14(4) and (5) of the Kenya Railways Act, which was not the case here.

The 1st and 2nd Defendants submitted that the Defendants had established that the suit property was vested in the 6th Defendant and set aside for public purpose, and as such was not available for allocation by the Commissioner of Lands or the President to the Plaintiffs. The 1st and 2nd Defendants submitted that the Plaintiffs produced, among others, a letter of allotment, a lease, a PDP, and a certificate of lease in an attempt to show legal ownership of the suit property. The 1st and 2nd Defendants submitted that the Plaintiffs should have gone beyond these documents to demonstrate how these documents were acquired and whether they fully complied with the due procedure of alienation of government land under the Government Land Act, Chapter 280 Laws of Kenya (now repealed).

The 1st and 2nd Defendants submitted that when a person's title to land is called into question, the title holder must show the root of his ownership. The 1st and 2nd Defendants cited Hubert L. Martin & 2 Others v. Margaret J. Kamar & 5 Others [2016] eKLR, Munyu Maina v. Hiram Gathiha Maina, Civil Appeal No.239 of 2009 and Mayfair Holdings Limited v. County Commissioner Kisumu & 3 others; Ethics & Anti-Corruption Commission & another (Interested Parties) [2024] KEELC 6332 (KLR) in support of this submission. The 1st and 2nd Defendants submitted that the documents produced in court by the Plaintiffs in support of their title to the suit property were illegal and were issued contrary to the provisions of the Government Land Act, the Kenya Railways Corporation Act, and the State Corporations Act (Chapter 446 Laws of Kenya). The 1st and 2nd Defendants reiterated that the suit property was part of land reserved for the 6th Defendant, Kenya Railways Corporation. The 1st and 2nd Defendants submitted that the suit property was not unalienated Government land, and as such, neither the Commissioner for Lands nor the President had power to allocate the same to the Plaintiffs. In support of this submission, the 1st and 2nd Defendants cited Court of Appeal, Civil

Appeal No. 288 of 2010; Kipsirgoi Investment Ltd. v. Kenya Anti-Corruption Commission.

The 1st and 2nd Defendants submitted that they did not have any proprietary interests in the suit property. The 1st and 2nd Defendants submitted that their participation in the suit could not assist the court to effectually and completely adjudicate on the dispute. The 1st and 2nd Defendants submitted that they were wrongly joined in the suit. On the issue of costs, the 1st and 2nd Defendants submitted that costs were at the discretion of the court as provided in Section 27(1) of the Civil Procedure Act.

The 3rd, 4th, 5th and 8th Defendants' submissions

The 3rd, 4th, 5th and 8th Defendants filed submissions dated 11th April 2025. The 3rd, 4th, 5th and 8th Defendants submitted that the Plaintiffs claimed the suit property on the ground that the same was allocated to them by the President of Kenya, while the 6th Defendant claimed the property on the ground that the property was vested in it in 1986. The 3rd, 4th, 5th and 8th Defendants submitted that holding a title to land in itself is not enough proof of ownership. In support of this submission, the 3rd, 4th, 5th and 8th

Defendants relied on Munyua Maina v. Hiran Gathihia Maina [2013] eKLR. The 3rd, 4th, 5th and 8th Defendants submitted that a holder of a title has a duty to tender evidence to show the process through which the title was obtained.

The 6th Defendant's submissions

The 6th Defendant filed submissions dated 16th April 2025. The 6th Defendant framed the following issues for determination by the court;

- a) Whether the Plaintiffs acquired the suit property lawfully and procedurally.
- b) Whether the Plaintiffs proved their case to the required standard and whether they are entitled to the prayers sought in the plaint.
- c) Whether the 6th Defendant proved its case to the required standard and whether it is entitled to the orders sought in their counter-claim.
- d) Who should bear the costs of the suit?

The 6th Defendant submitted that it had demonstrated that the suit property was part of its land for which it held a title long

before the alleged allocation to the Plaintiffs. The 6th Defendant submitted that the suit property was not available for allocation to the Plaintiffs as it was not unalienated Government land. In support of this submission, the 6th Defendant relied on, among others, Section 2 of the Government Land Act, High Court Civil Appeal No.288 of 2010, Kipsirgoi Investment Limited v. Kenya Anti-Corruption Commission, and Kenya-Anti-Corruption Commission v. Online Enterprises Limited & 4 others [2019] eKLR. The 6th Defendant submitted that the purported allocation of the suit property, which was a portion of the Railway land owned by the 6th Defendant since 1932 and in respect of which the 6th Defendant was issued with a certificate of lease in 1967, was illegal and unprocedural.

The 6th Defendant cited Sections 13 and 14 of the Kenya Railways Corporation Act and submitted that, should it become necessary to surrender its land to the government for allocation to another party, it has to be involved in the process. The 6th Defendant cited Sarnager Singh Hayer & Another v. Kenya Railways Corporation [2022] eKLR and submitted that for one to transfer

property from the 6th Defendant, the law requires that a surrender of title has to be executed, which was not done in this case.

The 6th Defendant submitted that the Plaintiffs had not proved their case to the required standard and, as such, were not entitled to the orders sought in the plaint. The 6th Defendant submitted that the Plaintiffs failed to demonstrate that the suit property was lawfully and procedurally excised from Title No. Kisumu Municipality Block 6/95(Railway land). The 6th Defendant submitted that the Plaintiffs also failed to demonstrate that a surrender of a portion of the Railway land to the government was undertaken before the issuance of their title for the suit property in 2016.

The 6th Defendant submitted that it had proved its case against the Plaintiffs to the required standard. The 6th Defendant submitted that it proved that it was still in possession of the title to the Railway land, Title No. Kisumu Municipality Block 6/ 95. The 6th Defendant submitted that it had demonstrated that it had never surrendered nor conveyed the suit property back to the government for reallocation. The 6th Defendant submitted that it

was entitled to the orders sought in its counter-claim against the Plaintiffs.

The 6th Defendant submitted that the Plaintiffs, in their submissions, raised the issue of public interest litigation, which was never part of the pleadings and the evidence. The 6th Defendant submitted that the Plaintiffs could not, at the very tail end of the proceedings and after going through a hearing where the 6th Defendant had demonstrated legal ownership of the suit property, seek to hide behind the guise of public interest litigation after reaching a dead end in their claim. The 6th Defendant submitted that to illegally occupy land already registered in favour of a legal entity, in the name of public interest, would be tantamount to anarchy. In support of this submission, the 6th Defendant cited Ndori Kayuga & Another v. Mike Sonko Mbuvi Gideon Kioko & Another (2022) eKLR and the Indian Supreme Court Case of Ashok Kumar Pandey v. State of West Bengal (Writ Petition, Criminal No 199 of 2003).

The 6th Defendant submitted that the Plaintiffs' claim that they had acquired the suit property by prescription was untenable in

that the suit property is public land, allocated to the 6th Defendant by the Government of Kenya. The 6th Defendant submitted that public land cannot be acquired through adverse possession.

Analysis and Determination

I have considered the pleadings, the evidence on record, and the submissions filed by the parties. I am of the view that the issues arising for determination in this suit are the following;

- (a) Whether the Plaintiffs are the lawful registered owners of the land Title No. Kisumu Municipality/Block 6/517 (the suit property).
- (b) Whether the suit property was illegally exercised from the land Title No. Kisumu Municipality/Block 6/95.
- (c) Whether the Plaintiffs have proved their case to the required standard.
- (d) Whether the 6th Defendant has proved its case to the required standard.
- (e) What should be the appropriate order/s to make in the matter in the circumstances?
- (f) Who should bear the costs of the suit?

The Plaintiffs claimed that the Government of Kenya allocated the suit property to them on 4th January 1994. The Plaintiffs alleged that they had occupied the parcel of land, which was allotted to them, surveyed, and registered as Title No. Kisumu Municipality/Block 6/517 since 1986. The Plaintiffs claimed that the then President of the Republic of Kenya visited the suit property in 1986 and commissioned the building of “Nyayo Sheds” for them, which were designed by the Ministry of Public Works, and constructed at the cost of the government. The Plaintiffs averred that the Government of Kenya had, over the years, undertaken various development projects on the suit property for the benefit of the Plaintiffs and their members. The Plaintiffs alleged that they were allocated the suit property following a Presidential directive.

The Plaintiffs produced in evidence several documents in proof of their title to the suit property. The Plaintiffs produced an incomplete and undated letter of allotment said to have been issued by the Government of Kenya to the 4th Plaintiff in respect of Uns. Jua Kali Site-Kisumu Municipality offering the 4th Plaintiff, a lease of 99 years with effect from 1st January 1994. The 4th Plaintiff was required to pay a stand premium of Kshs. 200,000/-

and an annual rent of Kshs. 40,000/-. The Plaintiffs also produced an unregistered lease in respect of the suit property dated 11th January 1999. The lease is indicated to have been issued and signed by the Commissioner of Lands. The same was, however, not signed by the Plaintiffs. The Plaintiffs also produced a Certificate of Lease dated 20th June 2016. The Certificate of Lease shows that the lessor is the County Government of Kisumu and not the Government of Kenya. The Plaintiffs produced in evidence another lease for the same property issued in their favour by the County Government of Kisumu as the lessor, dated 14th April 2016. The lease was signed by the Chief Land Registrar as the lessor and unnamed persons, whom I believe were the trustees of the 4th Plaintiff. This lease was registered on 20th June 2016. I believe that it was on the strength of this Kisumu County Government lease that the Certificate of Lease dated 20th June 2016, which I have referred to earlier, was issued. The Plaintiffs produced evidence showing that they have, over the years, paid land rent to the Government of Kenya and land rates to the County Government of Kisumu. The lease for the suit property was issued under the Land Registration Act 2012, while the

Certificate of Lease was issued under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed). Sections 27 and 28 of the Registered Land Act provide as follows:

“27. Subject to this Act -

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

Sections 24, 25, and 26 of the Land Registration Act, 2012, which repealed the Registered Land Act, provide as follows:

“24. Interest conferred by registration

Subject to this Act—

a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or

expressed agreements, liabilities or incidents of the lease.

25. Rights of a proprietor

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

26. Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

The 1st, 2nd and 6th Defendants contested the Plaintiffs’ claim over the suit property. The 1st, 2nd and 6th Defendants contended that the suit property was illegally and fraudulently carved out of the larger parcel of land, which was at all material times held by the 6th Defendant as the leasehold proprietor from the Government of

Kenya. The 6th Defendant produced evidence showing that through Legal Notice No. 440 of 1963, all the land that was in use or reserved for the use by the East African Railways and Harbours Administration was vested in the General Manager of the East African Railways and Harbours Administration. The 6th Defendant also produced evidence showing that, through Legal Notice No. 24 of 1986, all the land of the East African Railways Corporation was vested in Kenya Railways Corporation, the 6th Defendant. The 6th Defendant adduced evidence showing that the land that was owned by the 6th Defendant (The Railway land) was first surveyed in 1963 under Survey Plan No. 108/112 as L.R. No. 1148/1168. According to the survey plan, the land measured approximately 23.29 Acres (approximately 9.425 Ha.). The 6th Defendant produced in evidence Grant No. I.R 21961 dated 13th October 1967, through which the Government of Kenya granted to the 6th Defendant a lease over L.R. No. 1148/1168 (Railway land) for a term of 99 years with effect from 1st January 1932. Grant No. I.R 21961 was registered under the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed). The land was converted to the Registered Land Act, Chapter 300 Laws of Kenya (now repealed),

on 28th September 1975, and registered as Title No. Kisumu Municipality/ Block 6/95. The measurement of the Railway land remained approximately 23.29 Acres (9.425 Ha.). The Survey Plan No. 108/112, Plan for Kisumu Sailors Estate, Kisumu Municipality Development Plan No. 103, and the Registry Index Map for Kisumu Municipality Block 6, produced by the 6th Defendant in evidence as D.EXH. 2, 3, 4 and 6, show clearly that the suit property, Title No. Kisumu Municipality/ Block 6/517 is within the Railway land, Title No. Kisumu Municipality/ Block 6/95. I therefore agree with the 1st, 2nd and 6th Defendants that the suit property was excised from the Railway land. This may explain why the suit property has two leases, and the Plaintiffs seem not to be sure of their landlord/lessor. As mentioned earlier, there is an unregistered lease signed only by the Commissioner of Lands. The lease is said to have been issued following the allocation of the suit property by the Government of Kenya to the Plaintiffs. The Plaintiffs also came up with a lease now issued by the 1st Defendant in its favour. This is the lease that was registered and a certificate of lease issued in favour of the Plaintiffs in 2016. The Plaintiffs did not explain how a Government of Kenya allotment

and lease changed to a County Government of Kisumu lease. The Plaintiffs produced no evidence showing that the County Government of Kisumu, the 1st Defendant, allocated them the suit property. The property could not belong to both the National Government and the County Government at the same time. There was also no evidence that the County Government of Kisumu leased the suit property to the Plaintiffs apart from the lease bearing the County Government of Kisumu's name as the lessor, signed by a Land Registrar. I also wonder why the Plaintiffs paid and continued to pay land rent to the National Government if the suit property belonged to the County Government of Kisumu and was leased to the Plaintiffs by the said County Government.

Whether the suit property was allocated to the Plaintiffs by the Government of Kenya or the County Government of Kisumu, the 1st Defendant, the property was not available for allocation to the Plaintiffs. For the County Government of Kisumu, the 1st Defendant, it did not own the land. The land was owned by the National Government, which had already allocated it to the 6th Defendant. For the Government of Kenya, the land was already allocated and was not available for further allocation to the

Plaintiffs, save if it had been surrendered by the 6th Defendant back to the government.

Section 3(a) of the Government Lands Act, Chapter 280 Laws of Kenya (now repealed) provides that:

“The President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may—

(a) subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land;”

“Unalienated Government land” is defined in section 2 of the Government Lands Act as:

“Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment”.

The President of the Republic of Kenya or the Commissioner of Lands could only allocate unalienated government land. The Railway land from which the suit property was excised was already allotted to the 6th Defendant at the time the suit property was created. The land was therefore alienated and could not be allocated by the Commissioner of Lands to the Plaintiffs. As

correctly submitted by the 1st, 2nd and 6th Defendants, the land could be re-allocated to the Plaintiffs only if the 6th Defendant had surrendered it to the government under Section 14 (4) and (5) of the Kenya Railways Corporation Act, which provides as follows:

“14(4) The Corporation may at any time convey, transfer or surrender any land surplus to both its existing and future requirements by a conveyance or a deed of surrender either for, or without consideration:

Provided that land which was public land or trust land shall be surrendered to the Government and shall not be conveyed or transferred to any other person unless the Minister responsible for lands shall consent and so direct.

(5) The provisions of subsection (4) shall apply to land vested in the Corporation by any written law, including this Act, as well as to land conveyed to it or otherwise placed at its disposal”.

The Plaintiffs did not present any evidence to the court of the surrender of the suit property by the 6th Defendant before it was allocated to the Plaintiffs.

In Munyu Maina v. Hiram Gathiha Maina (supra), the court stated that:

“...When a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

In Daudi Kiptugen v. Commissioner of Lands & 4 Others [2015] eKLR, the court stated that:

“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”

In Nairobi High Court Civil Suit No. 1024 of 2005(O.S), Milankumar Shah & 2 others v. The City Council of Nairobi & another, the court stated as follows:

“We hold that the registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accord with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was not procured through fraud and misrepresentation to which the person or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest”.

In Dina Management Limited v. County Government of Mombasa & 5 Others Supreme Court Petition 8 (E010) of 2021 [2023] KESC 30 (KLR) (21st April 2023) (Judgment), the Supreme Court stated as follows at paragraphs 108 and 110:

(108) As we have established above, before allocation of the unalienated Government Land, there ought to have been processes to be followed prior. Further, we cannot, on the basis of indefeasibility of title, sanction irregularities and illegalities in the allocation of public land. It is not enough for a party to state that they have a lease or title to the property. In the case of Funzi Development Ltd & Others v County Council of Kwale, Mombasa Civil Appeal No.252 of 2005 [2014] eKLR the

Court of Appeal, which decision this Court affirmed, stated that:

“...a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or give its seal of approval to an illegal or irregularly obtained title.”

(110) Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The first allocation having been irregularly obtained, H.E. Daniel Arap Moi had no valid legal interest which he could pass to Bawazir & Co. (1993) Ltd, who in turn could pass to the appellant.”

Since the suit property was owned by the 6th Defendant when it was purportedly allocated to the Plaintiffs, and the same had not been surrendered to the government before or after the purported allocation, the allocation was unlawful and void. An act which is void is a nullity. The void allocation could not, therefore, create any valid interest in the suit property in favour of the Plaintiffs. In Macfoy v. United Africa Co. Ltd.[1961] 3 All E.R 1169,

Lord Denning stated as follows at page 1172 concerning a void act:

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the Court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”.

It is my finding that the Plaintiffs did not acquire a valid title or interest in the suit property. The Plaintiffs, although registered as the owners of the suit property, are not the lawful owners of the property. The suit property is owned by the 6th Defendant, which holds a valid title in respect thereof.

Having reached a finding that the suit property was created and allocated to the 4th Plaintiff unlawfully and that the title held by the 4th Plaintiff is a nullity, the Plaintiffs have failed to prove their case against the Defendants on a balance of probabilities. The Plaintiffs are therefore not entitled to the main orders sought in the amended plaint. The Plaintiffs are also not entitled to the

alternative prayer that they have acquired the suit property by adverse possession. The suit property is public land. As correctly submitted by the Defendants, the Plaintiffs cannot acquire the same by adverse possession.

As concerns the 6th Defendant's claim, the 6th Defendant has proved that it is the lawful owner of the suit property and that the allocation of the same to the Plaintiffs was unlawful and fraudulent, as it entailed surveying and subdividing the 6th Defendant's parcel of land, Title No. Kisumu Municipality/Block 6/95 and allocating a portion of it to the 4th Plaintiff without the 6th Defendant's knowledge or consent, purporting that it was unalienated government land.

Concerning the reliefs sought by the 6th Defendant, the 6th Defendant has made a case for the declaration sought in prayer (a) of its defence and the order for the cancellation of the title for the suit property held by the Plaintiffs. As for the eviction of the Plaintiffs from the suit property and a permanent injunction restraining them from interfering with the 6th Defendant's use and possession of the suit property, the 6th Defendant is entitled to

the orders, but the court will not grant the same as prayed. Article 43 of the Constitution provides as follows:

“43 (1) Every person has the right—

(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;

(b) to accessible and adequate housing, and to reasonable standards of sanitation;

(c) to be free from hunger, and to have adequate food of acceptable quality;

(d) to clean and safe water in adequate quantities;

(e) to social security; and

(f) to education.

(2) A person shall not be denied emergency medical treatment.

(3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants.”

In the Government of the Republic of Kenya’s Sessional Paper No. 2 of 1992, dated March 1992 on Small Enterprises and Jua Kali Development in Kenya, which the Plaintiffs relied on as the policy

framework for their activities, the government identified the following as the major benefits of the small enterprises;

- (a) “Significant contribution to the economy in terms of output of goods and services;**
- (b) Creation of jobs at relatively low capital cost, especially in the fast-growing service sector;**
- (c) Development of a pool of skilled and semi-skilled workers who are the base for future industrial expansion;**
- (d) Strengthening forward and backward linkages among socially, economically, and geographically diverse sectors of the economy;**
- (e) Creating demand as well as supply, as it has been established that 90% of rural enterprise products are marketed directly to rural households;**
- (f) Contributing to increased participation of indigenous Kenyans in the economic activities of the country;**
- (g) Offering excellent opportunities for entrepreneurial and managerial talent to mature, the critical shortage of which is often a great handicap to economic development;**
- (h) Supporting industrialization policies that promote rural-urban balance;**

**(i)Increasing savings and investments by local Kenyans and encouraging use of local resources, thus leading to more effective use of capital; and,
(j)Adapting quickly to market changes.”**

In the sessional paper, the government acknowledged the contribution of the Jua Kali sector to the economy, particularly in increasing the participation of indigenous Kenyans in the economic activities of the country, job creation, and the supply of goods and services. There is no doubt that the Jua Kali sector employs thousands of people in this country directly and indirectly. These people earn their daily bread from this sector. From what they earn, they can afford basic food, housing and sanitation, clean water, and education for their children, which are economic and social rights. From the evidence on record, the 4th Plaintiff has over 5000 members. The Plaintiffs told the court that on average, each Jua Kali artisan has between 5 to 10 apprentices. The Plaintiffs averred that there were about 38,000 people either working or undergoing training on the suit property. I am of the view that, in the circumstances of this case, forcible eviction of the Plaintiffs from the suit property without affording them an alternative place to ply their trade or giving them an

adequate time to look for an alternative place to move would violate their social and economic rights. The Plaintiffs led evidence that was not controverted that they had been operating from the suit property since the 1980s, and had, over the years, enjoyed the support and encouragement of both the National Government and the County Government, which had undertaken various development projects on the suit property for their benefit. The National Government, the County Government, and even the Kenya Railways Corporation made them believe that the suit property belonged to them; the National Government and the County Government, by the development projects they undertook on the suit property for the benefit of the Plaintiffs and for the Kenya Railways Corporation, by putting up boundary marks between the suit property and the rest of its land.

The Plaintiffs came to court not because the 6th Defendant, which was not even aware that the Plaintiffs were occupying its land, wanted the land back, but because the 6th Defendant had given part of the Railway land to the 1st Defendant to construct a modern market dubbed Uhuru Business Park Market Complex to resettle hawkers and other traders whose businesses were

demolished during the implementation of the government's project of revitalisation of Kisumu Port and Lake Victoria transport. The 1st Defendant wanted the Plaintiffs to vacate the suit property to pave the way for the construction of the said market.

Although the Plaintiffs have no right to the suit property, they have a right to be treated in a humane manner that respects their fundamental rights. They also have a right to have their economic and social rights protected. This can only be achieved in the circumstances of this case by the National Government or the County Government of Kisumu giving the Plaintiffs an alternative land to move to for the purposes only of the businesses they are currently carrying out on the suit property, or by the 6th Defendant giving the Plaintiffs a reasonable time to get alternative premises for their activities.

On the issue of the cost of this suit, I am of the view that, in the circumstances of this case, each party should bear its costs of the consolidated suits.

Conclusion

In conclusion, the following would be my orders in the consolidated suit:

1. Judgment is entered for Kenya Railways Corporation, the Plaintiff in ELC No. 8 of 2020 and the 6th Defendant in ELC No. 59 of 2019 for:

(a) A declaration that the entire parcel of land known as Title No. Kisumu Municipality Block 6/95, measuring 23.29 acres, belongs to Kenya Railways Corporation, and any subdivision to create the land parcel Title No. Kisumu Municipality Block 6/517 was illegal, irregular, fraudulent, null, and void.

(b) An order that the registration of John Jared Odero, Peter Nyaondo Nyawanda, and Paul Ohuare Obadha, the Trustees of Kisumu Centre Juakali Artisans Association, as the proprietors of the leasehold interest in land parcel Title No. Kisumu Municipality Block 6/517 is cancelled.

(c) An order that the Plaintiffs in ELC No. 59 of 2019, and the 1st, 2nd, 3rd and 4th Defendants in ELC No. 8 of 2020, shall vacate and hand over possession of the land parcel, Title No. Kisumu Municipality Block 6/517 to Kenya Railways Corporation, once the National Government or the County Government of

Kisumu gives them an alternative site to move to, acceptable to Kisumu Centre Jua kali Artisans Association, or within five (5) years from the date hereof whichever comes earlier, failure to which the Kenya Railways Corporation shall be at liberty to apply for their forcible eviction from the property.

2. The Plaintiffs' claim in ELC No. 59 of 2019 is dismissed.

3. Each Party shall bear its costs of the consolidated suit.

Dated and signed at Kisumu this 11th day of November 2025

**S. OKONG'O
JUDGE**

Judgment delivered virtually through the Microsoft Teams Video Conferencing platform in the presence of;

Mr. Mwamu for the Plaintiffs

N/A for the 1st and 2nd Defendants

N/A for the 3rd, 4th, 5th and 8th Defendants

Mr. Mutei for the 6th Defendant

N/A for the 7th Defendant

Ms. Anne-Court Assistant